BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAMON L. PIERSON	)	
Claimant	)	
V.	)	
	)	Docket No. 1,064,069
CITY OF TOPEKA	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the July 14, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 19, 2014.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, respondent conceded timely notice is not an issue. The parties agreed claimant's date of injury is September 25, 2012, and claimant is seeking temporary total disability benefits (TTD) from September 26, 2012, through January 15, 2013.

ISSUES

ALJ Avery found:

> Based upon the medical testimony and that of the claimant, the Court finds claimant suffered personal injury by accident that arose out of and occurred in the course of his employment with the respondent. Furthermore, the accidental injury was the prevailing factor causing his injury, medical condition and his impairment. While claimant had received treatment for preexisting myofascial and muscular pain, there is no documentation in the record of a previous herniated disc and the resulting radiculopathy.[1]

[1] ALJ Award at 6.

. . .

> The Court finds it more likely than not that the source of claimant's injury was the strenuous, repetitive work he performed for the respondent on September 25, 2012. September 26, 2012 is the date of injury by repetitive trauma, the date claimant was first restricted by Dr. Magee.[2]

The ALJ awarded claimant permanent partial disability benefits based upon a 15% whole body functional impairment. He denied claimant's request for temporary total disability benefits, stating:

> The Court holds that as long as claimant was receiving the appropriate weekly sum as the result of his sick leave and vacation leave, the employer has satisfied its obligation under the law. Since there is a dearth of evidence in the record regarding what exactly Mr. Pierson is claiming and for what dates beyond the leave payments, the Court declines to award additional temporary total disability.[3]

The ALJ granted future medical benefits, and all medical care necessary to cure and relieve the effects of claimant's injury by repetitive trauma was ordered paid by respondent.

Respondent contends claimant failed to prove he sustained injury by repetitive trauma arising out of and in the course of his employment and failed to prove his repetitive work was the prevailing factor in causing his injury, medical condition and disability. If claimant sustained a compensable injury, respondent asserts claimant's whole body functional impairment should be limited to 5% because Dr. Chris D. Fevurly's functional impairment opinion is the most credible. Respondent maintains claimant failed to prove he is entitled to future medical treatment and the TTD he requests. Respondent also maintains it should not be ordered to pay medical expenses claimant incurred with Dr. R. Dan Magee or for any medical provider referred by Dr. Magee.

Claimant contends he sustained injury by repetitive trauma arising out of and in the course of his employment with respondent and his work activities were the prevailing factor causing his injuries. He asserts he sustained a 28% whole body functional impairment. Claimant maintains he is entitled to receive 16 weeks of TTD for the period from September 26, 2012, through January 15, 2013. He requests the Board order any medical bills incurred with Dr. Magee or for any referral by Dr. Magee be paid by respondent. Lastly, claimant contends he is entitled to future medical benefits upon proper application.

The issues before the Board on this appeal are:

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[2] *Id.* at 7.

[3] *Id.* at 8.

1. Did claimant sustain injury by repetitive trauma arising out of and in the course of his employment with respondent?

2. What is the nature and extent of claimant's disability?

3. What, if any, temporary total disability benefits is claimant entitled to receive?

4. Should respondent be required to pay any medical expenses claimant incurred with Dr. Magee or for any referral by Dr. Magee necessary to cure and relieve the effects of his work injuries?

5. Is claimant entitled to future medical benefits upon proper application and approval?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant testified he began working for respondent almost 15 years prior to the regular hearing and worked in water pollution control for 11 years. A detailed description of claimant's job duties is set forth at page three of the Award and need not be repeated here.

Claimant testified that on the morning of September 25, 2012, he told his supervisor, Wanda White, of having neck pain from sleeping wrong. Claimant testified that when he woke up that morning, his pain was a one on a pain scale of one to ten. That same day, September 25, 2012, claimant and his crew were cleaning a sewer line when claimant noticed he was getting very stiff. He had a coworker, Greg Hutley, buy some over-the-counter pain-relieving patches. Mr. Hutley placed the patches on claimant's back.

According to claimant, at the end of the day, he talked about his stiffness with Ms. White, but did not report the stiffness as workers compensation because he thought it was just a sore muscle. That evening, claimant put ice on his back and told his wife he did not feel right. Claimant went outside and went numb from the waist up. Claimant's wife, a nurse, thought claimant had overdosed on lidocaine, which was in the pain-relieving patches. He called Ms. White that evening at her home and told her the work he performed that day caused his symptoms.

The next day, September 26, 2012, claimant saw his family physician, Dr. R. Dan Magee. Claimant testified he could not lift his head, move his neck and his arm was shot. He acknowledged telling Dr. Magee about doing yard work and waking up the morning of September 25 with upper back and neck pain. Claimant denied relating the back and neck pain to the yard work. Claimant testified he was prescribed physical therapy and medicine,

including Percocet, and was told not to work. Claimant indicated he called Ms. White and told her his condition.

Claimant testified he was also treated by Drs. Nicolae and Sankoorikal, medical doctors, and Dr. Penn, a chiropractic doctor. Dr. Nicolae gave claimant three injections in the back of the neck, which he indicated helped. Dr. Sankoorikal provided claimant nerve tests and an injection in the right elbow. Dr. Penn popped claimant's back. Claimant testified respondent did not send him to any of the aforementioned doctors. He indicated that on September 26, he asked Ms. White for medical treatment, but was denied. Claimant also testified that he requested medical treatment from Mishelle Wilcox, human resources manager for respondent, and was told there was an ongoing investigation.

According to claimant, he remained off work until sometime in January 2013, because respondent would not let him return to work with restrictions. He was uncertain how long he was off work. Claimant indicated he returned to his regular job duties without restrictions, but eases more of the work onto the rest of the crew and watches his body position so he does not get injured again. He also takes Percocet as needed. During the time he was off work, claimant used all his accumulated sick, vacation and compensation time. Claimant indicated he also received short-term disability benefits.

Claimant acknowledged seeing Dr. Magee prior to September 26, 2012, for right shoulder and neck complaints. Claimant filed prior workers compensation claims including a 2006 claim for a low back injury and neck strain. He admitted receiving neck and right shoulder injections prior to September 2012. Claimant recalled having neck injections one time by Dr. Nicolae in 2008. Claimant thought he had two or three right shoulder injections prior to September 26, 2012. He recalled injuring his right shoulder while skiing and possibly while playing volleyball.

Mr. Hutley testified that he and Don Finchum worked with claimant on September 25, 2012. They were operating a Vactor water truck. The truck is used to run a high pressure water hose that is hooked to a saw and run through sewer lines. On September 25, they were running long pulls. The truck was parked 100 feet from a manhole and the hose would be run to the manhole. Then 200 to 300 feet of hose was run into the sewer line via the manhole. The hose is on the truck and reeled in and out using the truck. Mr. Hutley testified the hose also has to be pulled manually or the crew would end up with a pile of hose. Mr. Hutley indicated that if the saw hits an obstruction, it has to be worked by pulling it by hand or with the truck. Mr. Hutley testified that on September 25, claimant was pulling the hose to the manhole. He indicated pulling the hose while it was in the manhole required claimant to lean over the manhole and use leverage to pull back against the roots. He testified he observed claimant repeatedly pull the hose during the workday.

Mr. Hutley indicated the morning of September 25, claimant made no complaints of pain or achiness. However, after pulling two lines, claimant complained of right shoulder

pain and had Mr. Finchum go to a drug store and get pain-relieving patches. Mr. Hutley placed the patches on claimant's upper back/neck area. When asked if he had an opinion on what caused claimant's condition, Mr. Hutley testified:

> Not to be honest with you. I just figured he was fighting them roots up there. Because I couldn't really see the manhole all that good, all I was doing was feeding the hose to him and I know there for a while he was pulling -- you know, pulling hose to fight the roots.[4]

Ms. Wilcox testified she was not an expert on the work injury process and would be guessing at what the process involved. She indicated if there is a work injury, the injured worker is supposed to report it immediately to his or her supervisor, who is responsible to report it by form to the human resources department. She indicated she had conversations in September or October 2012 with claimant regarding an incident or medical condition and how to proceed. If it was a work injury, she would have sent claimant to a workers compensation specialist. She testified claimant contacted her in September or October 2012 about the process for obtaining leave under FMLA and shared leave. In a Designation Notice form for FMLA dated October 10, 2012, claimant's request for FMLA leave was approved for the dates of September 26 through December 19, 2012. Ms. Wilcox testified claimant also applied for short-term disability. Ms. Wilcox testified she did not deny claimant workers compensation benefits. She indicated she did not speak to claimant about workers compensation. She did not know when claimant returned to work after his injury.

Ms. White testified she was an infrastructure support manager and claimant's immediate supervisor on September 25, 2012. She testified that every morning, there was a meeting with the entire crew at which she handed out job assignments and discussions were held. She testified that at the morning meeting on September 25, claimant was fidgeting and making awkward movements with his head and neck for two to three minutes. Ms. White asked claimant if he was okay and he responded he thought he might have slept on his neck wrong. Ms. White testified that was all claimant mentioned. Later that morning, she received a call from claimant and he reported stopping to get pain-relieving patches for his neck. According to Ms. White, claimant said his neck was sore, but did not report or allege a work injury. When claimant ended his shift, Ms. White asked claimant about his neck and he said it was bothering him, but did not state he suffered a work injury.

Ms. White testified claimant did not return to work on September 26 and was off work the rest of the week. During that time, claimant called her more than once. During those conversations, claimant never reported a work injury or requested medical treatment. Ms. White indicated she asked claimant during the conversations if he wanted to fill out an accident report and he said not at this time. Nor did claimant indicate he injured his neck

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[4] Hutley Depo. at 12.

and right shoulder by doing yard work or the injuries were from an old sports activity. Ms. White testified that on October 8, 2012, she first became aware claimant was alleging a work injury when he indicated he wanted to fill out paperwork to claim a work injury. On October 9, 2012, she completed a Supervisor's Initial Report of Accident/Injury.

At the regular hearing, the parties stipulated into evidence the medical records of Dr. Magee. A March 23, 2009, note indicated claimant was still having right shoulder pain, pain medications were not working and he would like a referral for an injection. On October 29, 2009, claimant called and requested Percocet for pain. On February 17, 2010, claimant had telephone contact with Dr. Magee's office and indicated his right shoulder pain had worsened and wanted to know what Dr. Magee suggested. On February 22, 2010, Dr. Magee injected claimant's right glenohumeral joint. Claimant spoke to Dr. Magee's office by telephone on March 4, 2010, and indicated he was still having right shoulder pain. On June 18, 2010, claimant again saw Dr. Magee for shoulder pain, right worse than left.

Claimant telephoned Dr. Magee's office on November 22, 2010, and indicated he reinjured his right shoulder. Claimant presented to Dr. Magee on March 16, 2011, for recurrent right shoulder discomfort and intermittent low back pain. The doctor gave claimant two injections to the right upper back and one to the right upper shoulder. On March 14, 2012, claimant had his medications refilled, including Percocet, and indicated he was playing more volleyball, which would make his right shoulder more painful.

On June 22, 2012, claimant reported to Dr. Magee of having right shoulder pain for three weeks. The doctor's notes indicated claimant was inner-tubing three weeks earlier, fell off and it was painful to move his head/neck up and down.

Dr. Magee's September 26, 2012, notes indicated he saw claimant for an injured neck and back and claimant was doing a lot of yard work two nights earlier and woke up the morning of September 25 with severe upper back and neck pain. The doctor also noted claimant presented for a new problem; claimant was working in the yard that weekend and then, at work, he did a lot of cable pulling. Shortly thereafter, claimant developed neck spasm, right greater than left, and had problems moving his neck. The doctor's assessments were cervical sprain/strain and activities involving gardening and landscaping. Dr. Magee wrote a letter dated September 26, 2012, indicating claimant should be off work due to injury until after his follow-up appointment the following week.

October 5, 2012, notes from Dr. Magee's office indicate claimant spoke to Karen Griffin of the doctor's office by telephone. Ms. Griffin indicated claimant needed a note from Dr. Magee stating his injury was work related and not from sleeping. On October 8, 2012, Dr. Magee wrote a letter "To Whom It May Concern," stating:

> Mr. Pierson has been seen periodically with complaints of poorly localized right shoulder area pain since 02/17/10, when he was seen as a new patient. Over the

> last few years, he has experienced persistence of that, despite different treatments. Then recently, he presented with numbness of upper extremities, neck pain (right to left) and more definite right upper arm dermatome pain. MRI supports radiculopathy. I think that he has suffered from cervical disc disease all that time. He is right handed and despite his active lifestyle, I think this probably resulted partially from his work associated activities. He may need an evaluation by a workers comp. provider for further therapy.[5]

On November 16, 2012, Dr. Magee, after seeing claimant, wrote another letter indicating claimant was released to return to work on November 20, 2012, but was limited to lifting no more than 20 pounds with the right arm. Dr. Magee's notes from a December 5, 2012, visit indicated claimant needed to go back to work full duty as respondent would not accept limitations.

At the request of his counsel, claimant was evaluated by Dr. Peter V. Bieri on October 21, 2013. Dr. Bieri's report indicated he reviewed the medical records of St. Francis Health Center and Drs. Magee, Nicolae, Sankoorikal, Frye, Teter and Gilbert. Dr. Bieri took a history from claimant and physically examined him. Claimant's medical history included a 2006 low back injury and right shoulder complaints since 2009. Claimant did not give a history of prior upper back or neck symptoms. The doctor opined:

> The claimant incurred injury during the course of active employment reported on or about September 25, 2013. Such injury involved the neck and right shoulder, with a subsequent diagnosis rendered consistent with disc herniation at C6-7 and right C6 radiculopathy. Radiographic and electrodiagnostic findings were confirmatory. All treatment was conservative in nature, with persistence of residual symptomatology and findings described above.
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> Diagnosis and treatment to date appear reasonable, appropriate and consistent.[6]

Dr. Bieri testified claimant's injury was the prevailing factor for his diagnosis, treatment and residual permanent impairment. Dr. Bieri, using the *Guides*,[7] determined claimant had a 15% whole person functional impairment and was in DRE Cervicothoracic Category III. Dr. Bieri testified he placed claimant in DRE Cervicothoracic Category III because he had radiculopathy in the right upper extremity. The doctor also opined claimant had a 25% right upper extremity functional impairment, which converts to a 15% whole body functional impairment. Dr. Bieri indicated his rating for the right shoulder was based on radiculopathy, weakness, sensory change and pain and range of motion deficits.

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[5] R.H. Trans., Cl. Ex. 1.

[6] Bieri Depo., Ex. 2 at 5.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The doctor testified the functional impairments combine for a permanent whole body functional impairment of 28%. Dr. Bieri indicated he did not apportion any of his functional impairment rating to a preexisting condition. He also indicated there was no specific injury to claimant's right upper extremity and his injury was to the neck. He assigned claimant permanent restrictions. Dr. Bieri indicated claimant would need prescription medication and perhaps epidural injections in the future. The doctor opined claimant may need surgery in the future, depending on the progression of his symptomatology.

Dr. Bieri indicated he was unaware claimant had prior cervical spine trigger point injections. Dr. Bieri confirmed the only information he had concerning claimant's prior right shoulder evaluations and treatment was contained in his report. The doctor was not aware claimant had received right shoulder treatment in June 2012. Dr. Bieri indicated claimant did not mention a December 2009 upper back and neck injury. Nor did claimant mention reporting issues with his upper back and neck to Dr. Magee in June 2010. Dr. Bieri indicated having that information might change his opinion regarding apportionment between claimant's current injuries and his preexisting condition.

At the request of respondent, claimant was evaluated by Dr. Chris D. Fevurly on January 21, 2014. The doctor reviewed claimant's medical records, took a history and physically examined claimant. Dr. Fevurly's report indicated claimant reported neck and low back pain in 2006 which required evaluation and treatment for more than two years. Dr. Fevurly detailed claimant's history of chronic neck, upper back and shoulder complaints since 2006.

Dr. Fevurly indicated claimant reported a work-related injury to his neck and cervical spine while working at a manhole on September 25, 2012, and doing a lot of forceful pulling and pushing when fighting and pulling lines. The doctor noted claimant told Dr. Magee on September 26, 2012, about doing a lot of yard work two days earlier and waking up on September 25 with severe upper back and neck pain. Dr. Fevurly indicated a cervical spine MRI was performed on October 4, 2012, revealing degenerative disc disease, bone spondylosis and facet joint hypertrophic arthrosis. There was also a small disc protrusion at C5-6 to the left and a disc bulge to the right at C6-7. The doctor testified he reviewed the MRI film, not just the MRI report.

The physical examination Dr. Fevurly conducted of claimant's cervical spine revealed a full range of motion. The doctor found no paraspinal tenderness over the cervicothoracic junction or over the bilateral trapezius. Nor did the doctor detect any spasm.

Dr. Fevurly indicated claimant had full range of motion in the shoulders and no pain in either shoulder at the extreme ranges of motion. There was a negative Hawkin's maneuver bilaterally and no weakness on rotator cuff testing, as well as no tenderness over the shoulder girdle muscles, which Dr. Fevurly testified was consistent with an MRI

of the right shoulder showing no significant abnormality. Dr. Fevurly attributed claimant's right shoulder pain to right C7 nerve root irritation or entrapment.

Dr. Fevurly noted normal motor strength and no sensory diminishment to pinprick and soft touch in the upper extremities except for diminished pinprick in the right index finger. There were normal deep tendon reflexes in the biceps and brachioradialis, with the right triceps possibly slightly diminished compared to the left. There was normal provocative testing for carpal tunnel syndrome. The doctor noted there was no other abnormality of the upper extremities on joint exam.

According to Dr. Fevurly, the prevailing factor for claimant's cervical condition is degenerative changes in the cervical spine, which are a natural consequence of aging. He testified, "The prevailing factors are genetics and aging."[8] The doctor noted that scientific literature does not support that repetitive trauma or heavy exertion is a significant contributor to the development of claimant's MRI changes. Dr. Fevurly testified claimant was at maximum medical improvement and his work event may have caused a temporary aggravation of his preexisting degenerative changes. He also opined claimant would not need future medical treatment as the result of his work injury.

Using the *Guides*, Dr. Fevurly opined claimant was in DRE Cervicothoracic Category III and had a 15% whole person functional impairment. However, the doctor attributed only 5% to claimant's September 25, 2012, work injury. He testified:

> Q. Right. Okay. I wanted to ask you about that, because when we talk about in your report you do assign a 5 percent which you relate to this work accident?
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> A. Right. I -- I said that I believe that based on his clinical history of recurrent right upper back and right shoulder complaints for six years prior to the work event, that likely that was a manifestation of radiculitis or radiculopathy prior to September, 2012, that was basically mislabeled or misattributed to shoulder tendinitis, which basically has been disproven, and that he had that pain from the nerve root irritation or entrapment that entire six-year span.[9]

Dr. Fevurly indicated Dr. Bieri used the *Guides* incorrectly by assigning claimant an additional impairment for the neuromuscular weakness in claimant's right arm. Dr. Fevurly noted that was factored into the DRE Cervicothoracic Category III rating and Dr. Bieri was "double dipping." The doctor testified there was no evidence weakness or loss of deep tendon reflexes in the right arm preexisted claimant's September 2012 work injury. Dr. Fevurly admitted that prior to September 26, 2012, Dr. Magee had not diagnosed

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[8] Fevurly Depo. at 14.

[9] *Id.* at 37.

claimant with cervical strain or sprain or the existence of cervical radiculopathy. Dr. Fevurly assigned claimant no restrictions.

By order of the ALJ, claimant was evaluated by Dr. Edward J. Prostic on May 6, 2014. The doctor reviewed claimant's medical records, took a history and physically examined claimant. Claimant gave a history of injuring himself at work in September 2012, when he developed significant difficulties while forcefully pulling sewer cable. Dr. Prostic testified he was never told by claimant of having a stiff and painful neck when he woke up on the morning of September 25, 2012.

Dr. Prostic was aware claimant was seen in September 2008 by Dr. Nicolae for a previous work injury with pain at the base of the neck and upper back and received trigger point, epidural steroid and facet joint injections. When asked if claimant reported any medical problems between 2008 and September 25, 2012, Dr. Prostic testified claimant reported complete relief of neck symptoms with time and treatment.

According to Dr. Prostic, claimant's post-injury right shoulder MRI was within normal limits. However, a post-injury cervical spine MRI revealed a small focal area of disc protrusion at C5-6 to the left and mild to moderate disc bulging at C6-7 to the right. Dr. Prostic testified he looked at the MRI report and did not think he looked at the actual MRI film. He acknowledged the cervical spine MRI report indicated claimant had osteophytes. The doctor testified: "My interpretation of this is that it's old disk disease and a relatively newer protrusion, otherwise he would have described it only as a disk osteophyte complex."[10] The doctor indicated that by new, he meant within several years.

Dr. Prostic opined claimant was in DRE Cervicothoracic Category III and had a 15% whole person functional impairment. He imposed no restrictions. The doctor opined the claimant's work injury was the prevailing factor causing his injury, medical condition, need for medical treatment and disability. The doctor testified if he had to apportion claimant's functional impairment, he would state 5% preexisted and 10% was from claimant's September 2012 work injury.

PRINCIPLES OF LAW AND ANALYSIS

Injury by repetitive trauma arising out of and in the course of employment with respondent

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

[10] Prostic Depo. at 12.

right depends.[11] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[12]

K.S.A. 2012 Supp. 44-508 states, in part:

> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
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> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
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> . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The Board finds claimant sustained injury by repetitive trauma arising out of and in the course of his employment with respondent and claimant's work injury was the prevailing factor causing his medical condition and impairment. Dr. Fevurly was the lone expert who opined claimant's work injury was not the prevailing factor causing his cervical condition. According to Dr. Fevurly, the prevailing factor for claimant's cervical condition was

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[11] K.S.A. 2012 Supp. 44-501b(c).

[12] K.S.A. 2012 Supp. 44-508(h).

degenerative changes in the cervical spine. That downplays certain findings on claimant's October 2012 MRI. Admittedly, that MRI revealed degenerative changes, bone spondylosis and facet joint hypertrophic arthrosis. However, the MRI also showed a small disc protrusion at C5-6 and a disc bulge at C6-7. Insufficient evidence was presented showing those structural changes were present prior to September 25, 2012.

Claimant's position is supported by Drs. Bieri and Prostic. Dr. Bieri opined claimant's work injury was the prevailing factor causing his right shoulder condition and neck injury. The Board disagrees with Dr. Bieri's opinion concerning claimant's right shoulder injury. On several occasions from 2009 through June 2012, three months prior to his work injury, claimant received right shoulder treatment from Dr. Magee. That treatment included right shoulder injections.

Dr. Prostic's opined claimant's work injury was the prevailing factor for his cervical condition and impairment. Dr. Prostic noted claimant's October 4, 2012, MRI showed degenerative disc disease, but also revealed a relatively new disc protrusion. The doctor also indicated there was no diagnosis of radiculopathy prior to September 25, 2012. That supports the ALJ's finding that claimant's work activities were the prevailing factor causing his cervical injury.

Nature and extent of claimant's disability

As noted by the ALJ, all three physicians who testified opined claimant was in DRE Cervicothoracic Category III and had a 15% whole person functional impairment as a result of his cervical condition. Dr. Fevurly opined that 10% of claimant's functional impairment was preexisting. In order to be in DRE Cervicothoracic Category III, claimant must have radiculopathy. There is insufficient evidence establishing claimant had radiculopathy prior to September 25, 2012. Dr. Prostic testified that if he had to apportion claimant's functional impairment, he would apportion 5% to claimant's preexisting condition and 10% to claimant's work injury. Dr. Bieri made no apportionment of the 15% functional impairment he assessed. The Board concurs with the ALJ's finding that claimant sustained a 15% whole person functional impairment for his cervical spine injury and respondent failed to prove claimant had preexisting radiculopathy.

The Board finds claimant failed to prove he sustained a right shoulder injury that arose out of and in the course of his employment. Dr. Bieri testified claimant did not have a specific right upper extremity injury and his injury was to the neck. Dr. Fevurly indicated an MRI of the right shoulder revealed no significant abnormality and claimant had full range of motion in the right shoulder. Claimant's cervical spine functional impairment rating accounts for his shoulder symptoms.

Temporary total disability benefits

K.S.A. 2012 Supp. 44-510c(b)(1) states:

> Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i, and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter, weekly payments shall be made during such temporary total disability, in a sum equal to 66⅔% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511, and amendments thereto, but in no case less than $25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511, and amendments thereto, per week.

Claimant was taken off work by Dr. Magee on September 26, 2012, and allowed claimant to return to work with restrictions on November 20, 2012. Claimant testified he returned to work sometime in January 2013, because respondent would not allow him to return to work with restrictions. Claimant was unable to specify what date he returned to work. That testimony is uncontradicted.

Claimant met the requirements for TTD as set out in K.S.A. 2012 Supp. 44-510c(b)(1). By using sick and vacation leave and receiving short-term disability payments, claimant received an amount equal to or greater than he would have received had he been paid TTD. However, that does not relieve respondent of its duty to pay TTD. The Board agrees with the ALJ the burden is on claimant to establish his right to TTD. Claimant should not be denied TTD merely because he cannot recall the exact date he returned to work. Claimant proved by a preponderance of the evidence he is entitled to TTD from September 26, 2012, through at least January 1, 2013. Therefore, the Board awards claimant TTD from September 26, 2012, through January 1, 2013, a period of 14 weeks.

> Medical bills claimant incurred with Dr. Magee or for any referral by Dr. Magee necessary to cure and relieve the effects of his work injuries

K.S.A. 2012 Supp. 44-510h states, in part:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> . . .

> (b)(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Claimant sought medical treatment on his own until October 8, 2012, when he asked to file a workers compensation claim. He testified that on September 26, 2012, he asked Ms. White for medical treatment and she refused. Ms. White testified that on October 8, 2012, she first became aware that claimant was alleging a work injury. Claimant also testified he asked Ms. Wilcox for medical treatment, an allegation she disputed. The Board finds the testimony of Ms. White and Ms. Wilcox credible in that respect. Therefore, the Board finds that any medical treatment claimant received prior to October 8, 2012, is unauthorized. Respondent is required to pay all medical expenses incurred by claimant commencing October 8, 2012, necessary to cure and relieve the effects of his work injuries.

Future medical benefits upon proper application and approval

K.S.A. 2012 Supp. 44-510k(a) states, in part:

> (2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

Dr. Bieri opined claimant will need future medical treatment of prescription medications, possible epidural injections and perhaps surgery. Dr. Fevurly opined claimant would not need any future medical treatment and Dr. Prostic did not testify concerning future medical treatment. The Board finds Dr. Bieri more persuasive. Dr. Fevurly's opinion is jaded by his belief that claimant's work activities temporarily aggravated his preexisting degenerative condition. Therefore, the Board finds claimant proved by a preponderance of the evidence that he is entitled to apply for future medical benefits.

CONCLUSION

1. Claimant sustained injury by repetitive trauma arising out of and in the course of his employment with respondent.

2. Claimant sustained a 15% whole person functional impairment.

3. Claimant is entitled to temporary total disability payments from September 26, 2012, through January 1, 2013, a period of 14 weeks.

4. All medical expenses claimant incurred from September 26 through October 7, 2012, are unauthorized. Respondent is required to pay any and all medical expenses incurred by claimant commencing October 8, 2012, necessary to cure and relieve the effects of his work injuries.

5. Claimant is entitled to future medical benefits upon proper application and approval.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 14, 2014, Award entered by ALJ Avery as follows: claimant is entitled to temporary total disability benefits at the rate of $570 per week for 14 weeks from September 26, 2012, through January 1, 2013, or $7,980, followed by 62.25 weeks of permanent partial disability benefits at the rate of $570 per week, or $35,482.50, for a 15% whole person functional impairment and a total award of $43,462.50, all of which is due and owing, less any amounts previously paid.

All medical expenses claimant incurred from September 26 through October 7, 2012, are unauthorized. Respondent is required to pay all medical expenses incurred by claimant commencing October 8, 2012, necessary to cure and relieve the effects of his work injuries. Claimant is entitled to future medical benefits upon proper application and approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[13] K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of January, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
paulpost@paulpost.com

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Honorable Brad E. Avery, Administrative Law Judge